(2)

Supreme Court, U.S.
FILED
JAN 4 - 2005
OFFICE OF THE CLERK

No. 04-508

In The Supreme Court of the United States

JOHNNA E. BURTON,

Petitioner,

vs.

BUCKNER CHILDREN & FAMILY SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

JOHN E. WALL, JR.
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue,
Suite 2001
Dallas, Texas 75206
(214) 887-0100 (*telephone*)
(214) 887-0173 (*facsimile*)

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

REPLY BRIEF FOR PETITIONER 1

NO MISSTATEMENTS OF FACT OR LAW 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 (2003) 1

STATUTE AND RULE

29 C.F.R. § 825 1

REPLY BRIEF FOR PETITIONER

Burton's petition presents clear evidence the Fifth Circuit and the trial court failed to consider Burton's summary judgment evidence in the light most favorable to her non-movant position in the summary judgment setting. Rather than address, the failures of the Fifth Circuit and the trial court Buckner has attempted to once again ignore the direct evidence of FMLA discrimination/ retaliation and argues the evidence in the light most favorable to their own position without ever attempting to address the direct evidence. Buckner claims the Petitioner, Burton has misstated the facts and law, without ever addressing the interplay between The Supreme Court's decision in *Desert Palace, Inc. v. Costa,* 123 S.Ct. 2148 (2003) and 29 C.F.R. § 825, Family and Medical Leave Act. The obvious reason is there is no way to explain away the evidence, which if it had been given proper weight and consideration, would have defeated summary judgment and which, probably would result in judgment as a matter of law.

There are no misstatements as claimed and will be demonstrated in the same order as erroneously claimed by Buckner.

NO MISSTATEMENTS OF FACT OR LAW

1. There is direct evidence of the FMLA discrimination.

The notes from JoAnn Cole were authenticated by Burton in her declaration, which was never objected to by Buckner and was before the trial court and the Fifth Circuit. Moreover as conceded in Buckner's Brief in

Opposition, page 2, Burton was terminated for alleged excessive absences. All of the absences attributed to Burton, which preceded her termination, were protected absences. Burton began FMLA leave July 26, 2000 and was on protected leave and subsequently intermittent leave all of which were protected as indicated. Buckner has never claimed any of the absences were for anything other than protected periods. As such, the claim Burton was fired for absences is direct evidence apart from the smoking Howitzer authored by JoAnn Cole in response to the inquiry from the Vice President of Human Resources. (App. pp. 19-20)

2. Two people did assume the responsibilities previously performed by Burton.

Burton's position was that of Director of Community Relations. (R. 194) Burton's responsibilities were initially assumed by Sandy Melton until Wally Jeffers and Jill Lewis were hired. (R. 212) Jeffers was hired as Special Events Coordinator in February 2001. (R. 201) Lewis was hired in January 2001 as Volunteer and Special Events coordinator. (R. 228). Burton's job responsibilities as described encompassed the tasks assumed by Jeffers and Lewis. (R. 194-95). Apparently it required two younger workers to perform the tasks previously performed by Burton.

3. Burton's alleged job performance problems did not predate the FMLA protection.

Burton was appraised by Weldon McElreath on February 24, 2000. (R. 177-78) The worst score on 13 categories of review was average. That score was attributed to four categories. All other ratings were above average with the

exception of one which was attitude and Burton was rated far above standard. Buckner claims Burton fails to apprise the Court of some alleged issue in January 2000. There was no issue other than Burton was in need of assistance which was not forthcoming. The meeting in March 2000 with Ken Hall, president, was not disciplinary even by Buckner's questions regarding the document. The memo was nothing more than an explanation of Burton's concerns on Buckner's direction and the explanation that Garza would be assuming the new position. (R. 96-98). Cole's outline of job failures begins with the first date of FMLA. An impartial fact finder could easily conclude from Cole's own hand there were no issues that preceded the FMLA leave. Again, Buckner like the courts below fails to recognize the evidence must be considered in the light most favorable to the non-movant.

4. The reasons for termination varied widely.

Cole claimed she was not involved in the decision to terminate and was never advised of the reason by Garza. (R. 216 & 222) Cole also admitted the decision may have been made while Burton was on FMLA leave. (R. 221) Cole claimed she was never advised of the reason for discharge by Garza (R. 222)

Garza claimed in his deposition that Burton was terminated because he kept getting calls from the president, Ken Hall. (R. 209). Of course his affidavit was different. (R. 136-38) Contrary to Cole, Garza claimed he told Cole of the reasons for the termination. (R. 211). Garza admitted he held no personal knowledge regarding the verity of the complaints. (R. 211) Strangely, Cole was responsible for documenting the alleged issues and would have been responsible for investigating the alleged complaints. (R. 211).

Ken Hall claimed Burton was fired for incompetence and not fulfilling the obligations of her job. (R. 197). Hall claimed the issues arose two and a half years prior to the discharge which, of course, is belied by all previous supervisors' reports. Hall claimed he had no ongoing conversations with Garza about what to do with Ms. Burton. (R. 199). Conversely, Garza testified, "I kept getting calls about issues and complaints, calls from the President. . . ." (R. 209) Hall was asked: "I mean did you have some ongoing conversations about what to do about Ms. Burton?" Answer: "Not with Mr. Garza." (R. 199). The varying reasons, persons involved and processes lead to the image of everyone finger pointing at each other. Also, this is a small sampling of the numerous credibility problems with Buckner's witnesses.

5. Mixed Motive is part of the case because of the CFR.

Rather than address the Code of Federal Regulations and the consideration of the protected absences in the decision to fire Burton, Buckner claims this was treated as a pretext case. The reasons advanced were pretextual and were refuted. Moreover it was repeatedly pointed out that the absences were considered and therefore the motion should have been denied and the Fifth Circuit should have reversed. Rather than address the evidence at all, the Fifth Circuit tersely concluded that the evidence offered by Burton was so ***trivial as to be immaterial.*** (Opinion p. 3) The Fifth Circuit maintained the evidence was in essence commonplace and ordinary. That is a weighing of the evidence at a minimum. The evidence was anything but commonplace. It was direct and damning. From the Circuit opinion this Court would likely think there was no evidence offered by Burton to oppose the summary judgment. That was simply not the case.

CONCLUSION

For these reasons and for those in the petition, the petition for certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded to the trial court.

Respectfully submitted,

JOHN E. WALL, JR.
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue,
Suite 2001
Dallas, Texas 75206
(214) 887-0100 (*telephone*)
(214) 887-0173 (*facsimile*)

Attorney for Petitioner